IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.
NOTICE OF MOTION NO.1958 OF 2007
IN
SUIT NO.1639 OF 2007

Lokhandwala Estates & Development
Company Private Limited ..Plaintiff.
Vs.
Shah Associated Enterprises & Others ..Defendants.
....
Mr. D.H. Mehta i/b Divya Shah Associates for the Plaintiff.
Mr. A. Wandrewala i/b M/s. Pravin Mehta & Mithi & Co. for Defendants 1 to 5.
Mr. M. P. S. Rao with Mr. J.B. Mitra i/b Mr. R.N. Kachave for Defendant No.6.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

17th December, 2007.

P.C. :

1. By consent, the Notice of Motion is taken up for hearing and final disposal.

2. The suit is for specific performance of an agreement dated 15th January, 1988. The suit was instituted on 30th April, 2007. By the agreement which was entered into between the Plaintiff and the First Defendant, the First Defendant agreed to sell to the Plaintiff an area of land approximately admeasuring

7,80,000 sq. ft. at the rate of Rs.65/- per sq. ft. An amount of Rs.12,50,000/- lacs was paid in pursuance thereof. It appears that the First Defendant who had entered into an agreement with the Plaintiff in turn had an agreement to sell with the Seventh Defendant, the owner of the land dated 1st February, 1967.

3. The remedy of an injunction is an equitable remedy and the Court would be justified in declining to grant an injunction where the conduct of the Plaintiff who moves the Court for reliefs is not fair and honest. In paragraph 6 of the Plaint, it has been stated that "the said agreement dated 15th January, 1988 continued to remain in force and operation and the same was not terminated by either of the parties".

4. In the affidavit in reply which has been filed by the First Defendant, the correspondence which was exchanged between the attorneys of the parties between 2nd April, 1988 and 19th August, 1989 has been annexed. The agreement postulated that a further amount of Rs.40 lacs would be paid within a stipulated period of the vendors making out a marketable title that an amount of Rs.2 Crores would be paid within three months thereafter and the

balance would be paid within five weeks of the grant of NA permission. From the correspondence which has been annexed to the affidavit in reply it would appear that on 16th August, 1988 the advocate for Defendant Nos.1 to 5 had stated that the vendors had made out a marketable title consequent upon which an appointment was sought for taking inspection of the documents of title. This was duly replied to on 20th August, 1988 by the advocate for the Plaintiff. By a letter dated 8th August, 1989 the advocate for Defendant Nos.1 to 5, on the instructions of his client called upon the Plaintiff to pay the balance of the consideration failing which it was stated that the agreement would automatically stand terminated and the earnest money of Rs.12,50,000/- will stand forfeited. There cannot be any dispute about the receipt of this letter because the advocate for the Plaintiff addressed a reply on 19th August, 1989.

5. There is a complete suppression of the correspondence exchanged between the advocates for the parties and of the factum of termination of the agreement by the aforesaid communication dated 8th August, 1989. This in itself would disentitle the Plaintiff to the benefit of an equitable remedy. On the

contrary, the statement which has been made in paragraph 6 of the plaint is that the agreement has continued to remain in force and operation and was not terminated by either of the parties.

6. That apart, it is now an admitted position that a suit was instituted by the Plaintiff before the City Civil Court in 1988 for an injunction simpliciter after which a notice of lis pendens was registered on 5th October, 1989. Interlocutory proceedings in the suit had come up to this Court when an order was passed on 4th April, 1989 in an Appeal from Order. Subsequently, the Notice of Motion before the City Civil Court was dismissed on 11th October, 1991 and the suit itself was dismissed in default on 23rd December, 1999. There is a reference to the interlocutory proceedings in paragraph 9 of the plaint which ends with the description of the order of the Court dated 4th April, 1989. Paragraph 10 of the plaint commences with the words “immediately thereafter on 20th April, 2007”. The intervening delay of nearly 18 years prior to the institution of the suit has not been satisfactorily explained. Prima facie, therefore, both on the ground of suppression of material facts and on the ground that there is an unexplained delay on the part of the Plaintiff in approaching this Court, there is merit in the

submission which has been urged on behalf of Defendant Nos.1 to 5 that the Plaintiff would be disentitled to any interlocutory relief.

7. Counsel appearing for Defendants 1 to 5 states that an amount of Rs.12,50,000/- shall be deposited in Court without prejudice to the rights of Defendants 1 to 5 in the suit. The aforesaid amount shall be deposited within a period of eight weeks with simple interest at the rate of 9% per annum computed with reference to the date of termination. The amount upon deposit shall be invested by the Prothonotary and Senior Master in a fixed deposit of a nationalized bank and to abide by the result of the suit.

The Motion is accordingly dismissed.